

# RE-DEFINING NATIONAL SOVEREIGNTY: THE KEY TO AVOID CONSTITUTIONAL REFORM? REFLECTIONS ON THE 2011 GREEN PAPER ON LAND REFORM

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## 1 Introduction

The results of post-apartheid land reform in South Africa, especially in terms of re-distribution of land for agricultural purposes, have for a substantial period of time prompted scholars both inside and outside the legal field to ask key questions about the actual ability of law to achieve social change. Change in this case translating into an equal, based on race, distribution of agricultural land and in turn the role of the distribution of such land in combating poverty. With the imminence of the centenary of the notorious Native Land Act 27 of 1913,<sup>1</sup> which dispossessed millions<sup>2</sup> of black South Africans, issues of land reform are contentious and high on the agendas of both the government and civil society.<sup>3</sup> Currently most of the deadlock in implementing and rejuvenating the existing reforms is linked to the perceived limitations within the Constitution of the Republic of South Africa, 1996 (“the Constitution”) itself and the apparent difficulties in amending it, as further discussed below. Therefore, one possible, alternative, way of rectifying the massive inequalities in the distribution of agricultural land is to try to fashion new discourses, which could expand the state’s ability to undertake the necessary reforms. This article sets out to explore what appears to be one such (new) discourse focusing on how the concept of state sovereignty can be used or misused, defined or re-defined to suit the determinations of a state, such as South Africa, in agrarian reform.<sup>4</sup> This article emphasises the possible links between different theories on state sovereignty (internal and external) and agrarian reform for agricultural purposes; and the way in which the idea of state sovereignty can act as a vehicle for hard-line agrarian reform when

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<sup>1</sup> Also known as the Black Land Act

<sup>2</sup> It is difficult to find a full account of the scale of state sanctioned land dispossession that took place under the racist regimes in South Africa. However, it has been estimated that more than 3.5 million people were dispossessed between 1960 and 1983. See L. Platzky & C. Walker *The Surplus People* (1985) 8–12.

<sup>3</sup> C. Walker “Delivery and Disarray: The Multiple Meaning of Land Restitution” in S. Buhlungu, J. Daniel, R. Southall & J. Lutchman (eds) *State of the Nation South Africa 2005–2006* (2006) 83.

<sup>4</sup> The term agrarian reform or *agrarianism* means political proposals for land redistribution, specially the re-distribution of land from the land-owning to the landless. This terminology is common in many countries, and originates from the *Lex Sempronia Agraria* or agrarian laws of Rome in 133 BC, imposed by Tiberius Gracchus, who seized the lands of the rich and distributed them to the poor. This definition of agrarianism is commonly known as “agrarian reform”. See H. Scullard *From the Gracchi to Nero: A History of Rome from 133 B.C. to A.D. 68* 2 ed (1963) 23.

all else appears to have failed. This article furthermore attempts to highlight some alternative avenues in constitutional interpretation to furnish new routes out of the current stalemate; focusing on remedies which currently are under-explored and deserve more scholarly attention.

Presently the greatest controversy exists around the issues of nationalisation of land and the position of the willing-buyer/willing-seller (“WBWS”) principle within the ambit of the expropriation clause in section 25(2)-(4) of the Constitution, going forward. These issues are interlinked, and they are furthermore closely related to state sovereignty as will be further discussed below. With regard to the WBWS principle and what Lahiff refers to as a “market-assisted agrarian reform”<sup>5</sup>, arguments have been forwarded both for and against the usefulness of this policy<sup>6</sup> as introduced by the African National Congress (“ANC”) in the 1997 White Paper on South African Land Policy.<sup>7</sup> Without having to further engage with this discussion it is clear from recent statements that the government is looking for a reasonable *alternative* to the WBWS principle in order to be in a position of actually promoting redistribution of land and the socio-economic right to property put forward in, for example section 25(5) of the Constitution.<sup>8</sup> This section stipulates a socio-economic right to property requiring the state to implement measures aimed at achieving land redistribution.<sup>9</sup> In a statement made by the Minister of Agriculture, Forestry and Fishing, at the Agri-SA policy conference in Stellenbosch earlier this year, the Minister proposed that “an alternative had to be found to WBWS principle if the land reform question is to be resolved”.<sup>10</sup>

The hypothesis that has guided the analysis as presented below is that a narrow interpretation of section 25 of the Constitution, as reinforced by government policy, cannot support the type of agrarian reform that the government needs to introduce to address the underperformance of current systems in place to reach the target of redistributing 24.9 million hectares to the black majority by 2014.<sup>11</sup> As concluded by Ntsebeza:

<sup>5</sup> E Lahiff “‘Willing Buyer, Willing Seller’: South Africa’s Failed Experiment in Market Led Agrarian Reform” (2007) 28 *TWQ* 1577 1577

<sup>6</sup> See for example Lahiff (2007) *TWQ* 1580 and L Ntsebeza “Land Redistribution in South Africa: The Property Clause Revisited” in L Ntsebeza & R Hall (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 120

<sup>7</sup> Department of Land Affairs *White Paper on South African Land Policy* (1997)

<sup>8</sup> *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 19

<sup>9</sup> The socio-economic right to property is premised on the argument that all people have a moral right to have at least enough property to enable them to survive or to lead a dignified existence. This means that if they do not have property, it should be provided for them, usually by the state. This claim would make the constitutional property right a socio-economic right. See I Currie & J De Waal *The Bill of Rights Handbook* (2005) 534-535. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 80-81

<sup>10</sup> Legal Resource Centre “Land Reform Issue Hots Up” (29-02-2012) *LRC* <<http://www.lrc.org.za/other-news/1800-2012-03-05-land-reform-issue-hots-up>> (accessed 01-03-2012)

<sup>11</sup> The long-standing target for land transfer under all aspects of the land reform programme is 24.9 million hectares by 2014, equivalent to 30% of white-owned agricultural land in 1994, estimated at 83 million hectares. E Lahiff *Land Reform in South Africa: A Status Report* Research Report 38 (01-07-2008) <<http://www.plaas.org.za/plaas-publication/rr-38>> (accessed 15-03-2012)

"There is a fundamental contradiction in the South African Constitution's commitment to fundamental land redistribution to the dispossessed while at the same time protecting existing property rights. The two ... cannot happen at the same time."<sup>12</sup>

Currently, there is a strong focus on private ownership by the strict use of expropriation in relation to the WBWS principle in government policy. The calculation of compensation with regard to the expropriation for the purpose of land reform (public purpose) has underscored government's policy and made large scale land re-distribution more or less impossible. At the same time, expropriation with less compensation (than market value) and deprivation, without compensation for socio-economic purposes (a wider interpretation of section 25) to foster equal land ownership in South Africa as spelled out, for example, in section 25(5) has not been sufficiently explored and utilised.

Furthermore, related to the necessity of a wider interpretation of section 25, is the urgent need for policy, and more importantly, legislation, built on innovative and alternative interpretations of sections 8, 25, 36 and 39 of the Constitution that would enable the state to exit the deadlock it is currently facing. This article will argue that contrary to the views expressed in recent policy there is no need to resort to discourses which would attempt to circumvent the Constitution and favour complete nationalisation of land to achieve successful re-distribution of agricultural land. There is, furthermore, no need for constitutional amendments, as already suggested by Hall, as the Constitution itself opens up for a number of solutions if there is a political will to explore them.<sup>13</sup>

The analysis of the above hypothesis has to take place within the existing legal framework, the historical context of land in South Africa, the current position of the state in terms of land possession and most importantly the enormous need for resources of the overwhelming majority of South Africans. At present the government claims<sup>14</sup> to control between 5-7% or about two million hectares agricultural land, which is too little to make an impact by transferring state-owned land as part of the redistribution scheme.<sup>15</sup> At the same time the government does not have the budget to expropriate agricultural land under the sometimes extorted and misused WBWS principle.

Furthermore, South Africa has the ability to be self-sufficient in virtually all major agricultural products and is currently a net food exporter.<sup>16</sup> Hence, farming remains vitally important to the economy and importantly the

<sup>12</sup> Ntsebeza "Land Redistribution in South Africa: The Property Clause Revisited" in *The Land Question in South Africa* 108

<sup>13</sup> R Hall "Land Restitution in South Africa: Rights, Development, and the Restrained State" (2004) 38 *CJAS* 654 661

<sup>14</sup> The land audit as carried out by the Department of Rural Development and Land Reform through the Chief Surveyor-General is yet to be finalised and the results to be published. In media statements by the Minister of Rural Development and Land Reform, Mr Nkwinti, and Agriculture Minister, Ms Joemat-Pettersen, it has been held that the audit will be completed by December 2012. See for example N Tolsi "ANC Introduces New Policy on Land Restitution" (30-06-2009) *Mail & Guardian Online* <<http://mg.co.za/article/2012-06-30-anc-introduces-its-new-policy-on-land-reform>> (accessed 21-08-2012)

<sup>15</sup> Y Groenewald "Who Owns What Land in South Africa?" (23-01-2009) *Mail & Guardian Online* <<http://mg.co.za/article/2009-01-23-who-owns-what-land-in-south-africa>> (accessed 15-03-2012)

<sup>16</sup> The Republic of South Africa *South Africa Yearbook 2008/2009: Agriculture & Land Affairs* (2009) 47

development of the larger southern African region.<sup>17</sup> The government is therefore faced with a major and quite common dilemma in a post-colonial sub-Saharan context: how to design/re-design land reform to radically and rapidly break from the colonial (and apartheid) past without significantly disrupting agricultural production and food security. The real challenge is that any reform has to fit within the negotiated and politically motivated realm of the Constitution. It attempts to both protect private ownership through the prohibition of the arbitrary deprivation of property and achieve equality in land by promoting land re-distribution through legislation in section 25(5).

To set the parameters for this critical discussion the analysis in this article departs from the most recent policy statement of the South African government on land reform, the Green Paper on Land Reform of 2011<sup>18</sup> ("Green Paper"). The controversy surrounding current land reform and its results sets the stage for a number of different interpretations of the contents and intentions behind this new policy and its possible implications for the constitutional protection of private ownership as well as the necessity of this drastic change of course. Within the ambit of this article, this policy statement will be used to explore possible connections between government policy, internal/external sovereignty and agrarian reform to reveal the contradictions that might follow when the idea of state sovereignty is superimposed over the Constitution to allow the government to gain greater control over land for purposes of agrarian reform instead of using a wider, permissible, interpretation of the Constitution.

At the moment the government is considering a number of different options, as is visible in the Green Paper, to reach its 2014 target. The discussions around the formulation of the new policy as put forward in the Green Paper have revealed that the government is understandably reluctant to engage in direct changes to the Constitution. To try to amend section 25(2)-(4) of the Constitution to curtail the expropriation clause and make land transfer easier and less expensive is a cumbersome and time consuming task requiring sufficient support in Parliament.<sup>19</sup> Furthermore, any change to the Bill of Rights is likely to face great resistance from civil society, the opposition parties, local and foreign investors, international donors and the international community over all.

Thus, one of the other options considered, as discussed in the Green Paper, would be to try to re-define the state's power over land through the concept of sovereignty to completely change the point of departure of all land reform. In other words, not departing from reverting private ownership as it is protected by the Constitution, but in the name of colonialism "repossess land

<sup>17</sup> The Republic of South Africa *South Africa Yearbook 2010/2011: Agriculture, Forestry and Fisheries* (2011) 38

<sup>18</sup> Department of Rural Development and Land Reform *Green Paper on Land Reform* (2011)

<sup>19</sup> To amend a section in the Bill of Rights a Bill suggesting such an amendment would have to be passed by the National Assembly with a supporting vote of at least two thirds of its members and by the National Council of Provinces with a supporting vote of at least six out of nine provinces (s 74(2) of the Constitution)

lost through force or deceit”<sup>20</sup> as part of the state’s direct prerogative based on sovereignty. This option would drastically side-step the Constitution and radically increases state power over land notwithstanding the Constitution. It is this underlying strategy, or simply the state’s view on its entitlement to land based on various aspects of sovereignty as put forward in the Green Paper, that this paper aims at analysing. Essentially, the key issue is, in light of the apparent dysfunction of the current strategy, what new notion the government will ascribe to in presenting further policy and, finally, new legislation.

## 2 The compromise and its impact

As has been repeated many times, South Africa is blessed with a representative democracy resting on the transformative values of a progressive Constitution including an extensive Bill of Rights. Of great importance to the development of agrarian land reform in post-Apartheid South Africa is the compromise struck between the National Party (“NP”) and the ANC with regards to property during the negotiations leading up to the Constitution of the Republic of South Africa Act 200 of 1993 (the “interim Constitution”). It is widely accepted that section 28 of the interim Constitution (the predecessor to section 25 of the 1996 Constitution) represented a concession between ANC and NP positions. As a consequence, a fundamental tension exists within this section arising out of the constitutional protection of existing property rights (at the end of Apartheid) while at the same time indicating a commitment to expropriate land “for public purpose” to undertake agrarian reform.<sup>21</sup> Hence, the interim Constitution and the Constitution clearly protect existing property rights while at the same time offering the opportunity of expropriation of land with compensation as well as catering for extensive land reform.

One of the earliest and most known interpretations of the property clause in the interim Constitution is the one put forward by Chaskalson; which in hindsight appears to have been a very optimistic interpretation. According to him, section 28(2) read with section 28(3) “set up a distinction between deprivation of rights in property and expropriation of rights in property”.<sup>22</sup> The former was to be performed “in accordance with law”<sup>23</sup> while for expropriation there were two added requirements, “the expropriation had to be performed pursuant to a public purpose and had to be followed by the payment of compensation”.<sup>24</sup> The ANC, according to Chaskalson, understood the inclusion of section 28(2) to mean that, “in the absence of an expropriation, compensation need not be paid to a party deprived of property rights by state action”.<sup>25</sup> Chaskalson’s optimism seems to have been based on his understanding and interpretation of the compromise reached in

<sup>20</sup> Department of Rural Development and Land Reform *Green Paper on Land Reform* 1

<sup>21</sup> Ntsebeza “Land Redistribution in South Africa: The Property Clause Revisited” in *The Land Question in South Africa* 115

<sup>22</sup> M Chaskalson “Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution” (1995) 11 *SAJHR* 222 236

<sup>23</sup> 236

<sup>24</sup> 236

<sup>25</sup> 236

the negotiations between the NP and the ANC. Although agreeing that the wording of section 28 was “not always clear”,<sup>26</sup> he imagined that the courts “would do well to adopt a purposive approach” in interpreting this section (and later section 25), bearing “in mind the compromise which the section” sought to achieve.<sup>27</sup> Drawing from comparative legal history, Chaskalson concluded that if courts were “overzealous in their protection of property rights ... the potential for constitutional conflict between court and state will be substantial”.<sup>28</sup> He also on this point argued, correctly, that given that “any substantial land reform programme is likely to depend on expropriation ... land reform could be rendered constitutionally impossible”.<sup>29</sup> It is evident by the language used in the Green Paper that it is at this point of constitutional impossibility that the government finds itself at present.

Having due regard to the compromise struck in 1993 it becomes inherently difficult to argue that land reform should take place strictly within the ambit of the Constitution. The reality is that if the Constitution is interpreted in a narrow way, land reform as it was envisaged by the ANC in 1993 is rendered almost impossible. The question that then remains is how to balance the idea of the compromise (in hindsight not fully accommodated in the interim and final Constitutions) with the current instructions of the Constitution, the apparent need for agrarian reform as well as the continuance of agricultural production and food security; and furthermore how to solve this problem without plunging the country into financial pandemonium by disrupting its vital agricultural production and scaring off international investments. The Green Paper, being an initial policy document, only presents us with a few, quite vague, answers to the important questions posed above. In addition it creates a number of pertinent issues (not all of them addressed in this paper) that might seem inherently political, but that have great bearing on key legal concepts that need to be addressed in order to create legal certainty as a basis for successful land reform.

### **3 The Green Paper: Is national sovereignty defined in terms of land?**

On 31 August 2011, the long-overdue Green Paper was published by the Department of Rural Development and Land Reform (“the Department”) to set in motion a consultation process on the contents of the Green Paper across the country. Even though the Green Paper should only be regarded as a tentative government report on policy within the area of land reform without any specific commitment to action, it is an important first step in reviewing the existing structures to finally propose new legislation or change existing laws. The review is focusing on the policy statements of the 1997 White

<sup>26</sup> M Chaskalson “The Property Clause: Section 28 of the Constitution” (1994) 10 *SAJHR* 131 139

<sup>27</sup> 139.

<sup>28</sup> 139.

<sup>29</sup> 136-137

Paper<sup>30</sup> as well as other programmes and products of the, then, Department of Land Affairs.

The main objective of the Green Paper is to set in motion a new trajectory for land reform and accordingly a set of proposals were put forward which, in the words of the Department, “attempts to break from the past without significantly disrupting agricultural production and food security, and avoid redistributions that do not generate livelihoods, employment and incomes”.<sup>31</sup> This trajectory is, as is evident in the eleven page long Green Paper, set within strict, politically motivated values which sharply deviate from the backbone of the new constitutionally driven South Africa – powered, not discouraged, by the Truth and Reconciliation Process. The tone is set by the statement in the introduction of the Green paper spelling out that:

“The Truth and Reconciliation Commission (the TRC) has adequately demonstrated the capacity and political will of black people, in general, and the African majority, in particular, to forgive. BUT, this goodwill should not be taken for granted, because it is not an inexhaustible social asset. It is an asset around which we should work together to build our collective future. That is the spirit of this Draft Green Paper.”<sup>32</sup>

The Green Paper has been presented as a constructive foundation for further discussions while at the same time highlighting the government’s political agenda. A balancing act that may prove to be far more difficult than previously, considering the heightened attention given to land as a means not only for development but also for liberation. The “land issue” is described in the Green Paper as the battleground of socio-economic equality and the means with which a new cultural hegemony can be established. Even though the substance of the Green Paper is inherently political and very much emotional, it serves to inform South Africa’s legislative future in terms of ownership, food production and combating poverty. It is therefore important to scrutinise and debate, from a legal perspective, the points of departure that the government has chosen for this exercise; points of departure, as argued in this article, that may prove to be counterproductive and create division instead of the unity that is advocated within the founding document of the nation, the Constitution.<sup>33</sup> It is apparent from the strategy and language used in the Green Paper, as discussed further below, that the new path of land reform is not exclusively dependent on the Constitution. It is aimed at once and for all changing the paradigm that has previously informed land and agrarian reform in South Africa. It also seems like land reform is no longer viewed as an inherently peaceful and transformative process but as an anti-colonial struggle where repossession of land lost through force or deceit and the restoring of indigenous culture are at the forefront.<sup>34</sup> In reality, the constitutional mould,

<sup>30</sup> Department of Land Affairs *White Paper on South African Land Policy*

<sup>31</sup> G Nkwinti “Media Statement on the Green Paper on Land Reform 31 Aug 2011” (31-08-2011) *Department of Rural Development and Land Reform* <<http://www.ruraldevelopment.gov.za/DLA-Internet/content/news/GreenPaperMediaStatement.jsp>> (accessed 15-03-2012)

<sup>32</sup> Department of Rural Development and Land Reform *Green Paper on Land Reform* 3

<sup>33</sup> Preamble of the Constitution

<sup>34</sup> Department of Rural Development and Land Reform *Green Paper on Land Reform* 1



in the narrow sense, cannot expedite the promises of the ANC government, so what will be the way forward?

The essential idea behind the Green Paper, as with any policy document, is that it should form a critical part of the debate on how to move forward with regards to agrarian reform. In the words of the Minister:

“We must, as a nation be open to robust debate, so as to emerge with a way forward for land reform, that will ensure a better life for all.”<sup>35</sup>

The point of departure of this paper is to question the underlying idea of the Green Paper to put nationalisation of land as an asset or, as it is indicated in the Green paper, to view land as a national asset at the forefront of this “robust” discussion. The most crucial issue is the introductory statement in the Green Paper that spells out that:

“National sovereignty is defined in terms of land. Even without it being enshrined in the country’s supreme law, the Constitution, land is a national asset. This is where the debate about agrarian change, land reform and rural development should, appropriately, begin. Without this fundamental assumption, talk of effective land reform and food sovereignty and security is superfluous!”<sup>36</sup>

It further goes on by indicating that:

“All anti-colonial struggles are, at the core, about two things: repossession of land lost through force or deceit; and restoring the centrality of indigenous culture.”<sup>37</sup>

These statements both highlight and complicate the ambivalent compromise struck between the ANC and NP at the advent of the interim Constitution, as discussed above, that envisaged a transformation of land distribution but never at the cost of any unconstitutional infringements of the protection of private ownership; that is to say, recognising and entrenching land rights acquired through colonialism and apartheid.<sup>38</sup> It is quite clear that the new policy takes focus off the apparent failure of the government to reach the targets set with regards to land reform and frames the current problems as a struggle against colonialism – not as a struggle against corruption, mismanagement or breakdown of the current systems and strategies for land reform. Even if it is easy to conclude that the root of the extremely uneven land distribution in South Africa is the massive dispossession and relocation of black South Africans during colonial and apartheid rule, the value of this rationale in solving the current crisis in land reform is questionable. These statements further contradict the multi-cultural and multi-ethnic society that the Constitution sets out in, for example, sections 9, 30 and 31, not only highlighting the importance of indigenous culture but leaving room for all cultures and cultural expressions to thrive in South Africa within the ambit of the Bill of Rights.

Put in the context of colonialism, the suggestions of a new cultural hegemony and the centrality of indigenous culture as brought forward in

<sup>35</sup> G Nkwinti “Media Statement on the Green Paper on Land Reform 31 Aug 2011” *Department of Rural Development and Land Reform*

<sup>36</sup> Department of Rural Development and Land Reform *Green Paper on Land Reform* 1

<sup>37</sup> 1

<sup>38</sup> Ntsebeza “Land Redistribution in South Africa: The Property Clause Revisited” in *The Land Question in South Africa* 113



the Green Paper makes it possible to question whether the government has perhaps, willingly or by mistake, mixed up the ideas of authority over land externally and internally. Traditionally, internal sovereignty is limited by the founding agreement (in a democratic state), different from the concept of sovereignty with regard to totalitarian rule where authority over land externally and internally would grant the state the right to full control, ie disregarding private ownership if necessary. The above statements could be an indication that the government is intending to use, as will be further discussed below, the concepts of sovereignty and colonialism to construe a new baseline that would allow it to regard all land as an asset already belonging to the state. In other words, either misconstruing the concept of external and internal sovereignty or moving towards totalitarian rule in disregarding the Constitution. This might be regarded as a subtle shift or a rhetoric issue but the consequences of this shift, it is argued below, will not be subtle but rather a great leap toward a new paradigm in agrarian reform.

The “national asset” statement should furthermore be viewed in the context of the discussions that took place before the Green Paper was made official. In the first draft proposal that was made public in 2010 it was suggested by the Minister that “all productive land” should be turned into a “national asset” by amending the Constitution and that the land then should be leased back to the farmers.<sup>39</sup> This naturally sparked an intense debate between the government, the farming community, civil society organisations and international investors fearing that they would lose what they had already invested in. Another option mooted was to retain the current freehold tenure system but impose a ceiling on the number or size of landholdings owned by individual farmers. From this perspective the new policy statement in the Green Paper is a direct attempt to de-link the nationalisation idea from productive farm land to avoid (international) criticism but at the same time indirectly retain the same (widened) prerogative by declaring “all land” and not only “all productive land” a national asset. Even though it might not, in general, be possible to draw a direct link between the idea of land as a national asset and nationalisation of land the discussion prevailing in the Green Paper clearly revealed the intentions of the government in this regard.

From this new point of departure it will be much easier for the ANC government to argue greater rights of the state to interfere with private ownership since the new theory seems to be based on an inherent right of the state to all land regardless of its status and the rights and duties under the Constitution. Furthermore, instead of having to go through the cumbersome and perhaps impossible process of amending section 25 of the Constitution, using the procedure as spelled out in section 74, and having to take cognisance of the views of the opposition and civil society, the government seems to be opening a door towards circumventing the Constitution by re-interpreting the concept of sovereignty. However, it is submitted that it is a misconception to regard national sovereignty as defined by the possession of land rather than

<sup>39</sup> Department of Rural Development and Land Reform *Strategic Plan 2010-2013* (2010) 11 <<http://www.info.gov.za/view/DownloadFileAction?id=123854>> (accessed 12-03-2012)

the authority over territory. This misconception relies in part on the classical concept of equal sovereignty as it is defined in international law and its close relationship with the issue of statehood which in turn embraces the ideas of territory, population, government, capacity to act, state recognition and the respect for basic human rights. There can be no state without a territory ie land (and waters) under the jurisdiction of a government. But as much at the concept of sovereignty in international law relies on the notion of territory it does not indicate how the state should hold its territory, ie how it should express its authority over it. This is in most jurisdictions left to be defined in the founding agreement or the Constitution of the state.

#### **4 The international doctrine of equal sovereignty, statehood and its reliance on territory**

The concept of sovereignty is introduced in the initial statement of the Green Paper as outlined above. The statement of the government that “[n]ational sovereignty is defined in land” and that based on this “land is a national asset” necessitates a further discussion about the difference between the notion of internal and external sovereignty; where the external or international sovereignty is much more relying on land or territory as a base of exercising power/authority. To understand the concept of sovereignty and moreover to understand how the concept of national sovereignty as it is generally understood differs from the concept used in the argument put forward by the policy makers in the Green Paper, this article introduces and explains the notion of the equal sovereignty of all states (external or international sovereignty) and related concepts such as statehood and state recognition under international law. It highlights how these concepts relate to, but differ from, national sovereignty and how land plays a very different role in defining national sovereignty compared to the role land or territory (as the term used in international law and in this section used inter-changeably) plays in outlining the powers of the state. To put it simply and perhaps in too general terms, power over territory defines power in interstate relations to a great extent, ie in interstate relations sovereignty is largely (but not exclusively) defined in terms of power over territory. However, as further discussed below in internal affairs, national sovereignty can be defined as the ability of governments to exercise unilateral control over their policy instruments and the issues that are important to them, and to operate without outside influence in their internal affairs. The first feature reflects the extent to which a government can dictate the outcomes over the things it cares about, and the second feature reflects the extent that a government is free to determine its own affairs when other governments are indifferent to its choices.<sup>40</sup> Departing from this definition it is possible, as will be further argued below, to separate authority from control and sovereignty from land monopoly.

<sup>40</sup> K Bagwell & R Staiger “National Sovereignty in an Interdependent World” (2003) *IDEAS: Economic and Finance Research* 1 <<http://www.ssc.wisc.edu/econ/archive/wp2003-27.pdf>> (accessed 15-03-2012)

In international relations and under international law territory gives the state entity the right to act within the international community if it fulfils the criteria of statehood as discussed below. In contrast, internal sovereignty in a modern democratic state, such as South Africa, would allow the state to express authority over its territory and govern within its jurisdiction but only as far as the Constitution allows and without confusing this with actual land possession or ownership. It could of course possess some land in terms of pure ownership. But would, to a great extent, allow different parties to own and use land for different purposes. This would not contravene the safety and security of the state. The usage and ownership of land could be for the greater good of the individual, group or enterprise *and* for the greater good of the state in ensuring investments (foreign and domestic), food security and the support of functioning taxation strategy as a model of redistribution of wealth. Power, as within international law, would not from an internal perspective have to be rooted in the notion that the state is the almighty ruler over its territory. It has the power and authority to act within its land but in a true democratic state there would be limitations on the state's capacity to act and also, it is submitted below, to own, possess or express power over land. In the case of South Africa these limitations are clearly expressed in section 25. It is, therefore, a fruitless exercise to try to argue, as is done in the Green Paper, that national sovereignty should be defined in terms of land and that even though land is not described as a national asset in the Constitution all of it could be regarded as a national asset to the extent that it would circumvent section 25.

Under international law the principle of the equal sovereignty of all states is a fundamental principle underlying the whole notion of the international community and having universal relevance.<sup>41</sup> The international community is not homogenous and therefore fundamental principles such as the principle of the equal sovereignty of all states serves as a common core, a point of departure for all international law and all international relations. Considering that there is no international constitution guiding the welfare of the international community as a whole, basic principles such as the principle of equal sovereignty of all states assume the role of guiding policy, aiding in the interpretation of law, filling gaps in legislation and constructing new legal provisions in international law. Principles of this nature are found both in international customary law and in international treaty law.

The concept of equal sovereignty in international law is put forward as a rule of international law in article 2(1) of the UN Charter<sup>42</sup> stating that "[t]he Organization is based on the principle of the sovereign equality of all its Members". The contents and context of this principle was further defined in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations<sup>43</sup> in 1970 indicating that "the territorial integrity and

<sup>41</sup> A Cassese *International Law* 2 ed (2005) 48

<sup>42</sup> Charter of the United Nations (1945) 1 UNTS XVI

<sup>43</sup> UN General Assembly *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* (1970) Resolution 2625 (XXV) (A/8082)

political independence of the state are inviolable”.<sup>44</sup> It is clear from this statement that the territory of the state is important and the importance and position of territory becomes even more evident once the principle of equal sovereignty of all states is reflected against the conditions of statehood and its relationship with the recognition of states. For an entity to become a state it needs to be able to fit into the mould of statehood; this mould or concept gives us a very good idea of the importance of territory as a base for state power in external and, to a certain extent, internal affairs.<sup>45</sup> As is argued below, internal safety and security conditions forces the state to take authority over territory just as it does in international law but for the sake of modern international law territory is viewed as either being controlled or not controlled by the authority of the state. It does not prescribe that the state has to control the territory in terms of ownership or as an asset belonging to the state.

In medieval times the European ruler of the land was also the “owner” who allocated the land to whom he or she saw fit. The early Westphalian concept of state sovereignty was very closely related to the actual possession of territory.<sup>46</sup> However, what we would regard as control over territory in terms of sovereignty both internally and externally should today, within modern international law, not be confused with possession of territory as the classic concept of equal sovereignty would have indicated. Under modern international law state territory can be defined as: “That defined portion of the surface of the globe which is subject to the sovereignty of the state”.<sup>47</sup> A state without territory is not possible, although the necessary territory may be very small. The importance of state territory lies in the fact that it is the space within which the state exercises its “supreme authority”.<sup>48</sup> The Montevideo Convention on Rights and Duties of States<sup>49</sup> (“Montevideo Convention”), states in article 1 that:

“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”

The territorial sovereignty extends to: the designated landmass, the subsoil, the water enclosed therein, the land under that water, the seacoast (territorial sea) up to a maximum of twelve nautical miles and the airspace over the landmass (exact limit not yet established) and the territorial sea.<sup>50</sup> In terms of the territorial sovereignty as a concept of modern international law article 1(b) and (c) of the Montevideo Convention would be considered as more important in determining the relevance of territory to the sovereign capacity of the state. With regards to the territory of the state it is adequate to indicate that in international terms there is no minimum size of what can be regarded as a state. The states borders do not have to be precisely defined, as for example

<sup>44</sup> Para 1

<sup>45</sup> J Dugard *International Law: A South African Perspective* 4 ed (2011) 81-86

<sup>46</sup> F Ganshof *Feudalism* 3 ed (1976)

<sup>47</sup> LFL Oppenheim *International Law* 8 ed (1955) 451-452

<sup>48</sup> 452

<sup>49</sup> Montevideo Convention on Rights and Duties of States (1933) 165 LNTS 19

<sup>50</sup> R Wallace & O Martin-Ortega *International Law* 6 ed (2009) 100-101

with the state of Israel; however, there has to be an effective and continuous control over the territory. Furthermore, territorial sovereignty presupposes a positive obligation to protect the population of the state. In terms of the government it needs to be effective in the sense that it has effective control over the territory; that it is independent of other authorities; and that it enjoys legislative and administrative competence.<sup>51</sup>

Territory is important but the connection in terms of external sovereignty is *authority* and not actual *possession*. From this perspective it is interesting to further explore the concept of national sovereignty. The Green Paper has left us with two main questions. Firstly, whether national sovereignty really is defined in land; and secondly whether this gives the state (in this case the South African government) the right to regard land as an asset of the state to ease nationalisation even though the Constitution may contradict this? As with the discussion about equal sovereignty the aim is not to produce a definition which would satisfy all the requirements of any fields of knowledge that would be involved with this issue. It is enough to say that lawyers and political scientists, to name but two fields, would sometimes have different views on some of these fundamental concepts.

With sovereignty meaning holding supreme, autonomous authority over a state, as discussed above, internal (national) sovereignty refers to the internal affairs of the state and the positioning of supreme power within it.<sup>52</sup> National sovereignty could, for the purpose of this article, be defined as indicating that sovereignty belongs to and derives from the state, an abstract entity normally linked to a physical territory (as defined under international law) and its past, present and future citizens. It is undoubtedly an ideological concept derived from liberal political theory. It traces back to Locke in the late seventeenth century and to Montesquieu in eighteenth century France.<sup>53</sup> Under the concept of national sovereignty, the state is regarded as superior to the individuals of whom it is composed. National sovereignty can be contrasted, on the one hand, to absolutism and to other doctrines that see sovereignty as residing solely in a monarch, aristocracy, theocracy or other small elite (classic notion in international law),<sup>54</sup> and on the other hand to popular or representative sovereignty,<sup>55</sup> which has more egalitarian implications as in the South African case (modern notion in international law).

The first real application of the idea of national sovereignty was in the constitutions of the French Revolution (1789–1799). National sovereignty was conceived as indivisible and inalienable, not simply parcelled out among individuals or any other units who formed the nation. The French Revolution was explicitly national, based on the concept of a nation state whose interests took precedence over those of individuals, even while guaranteeing rights to individuals. Article 3 of the French Declaration of the Rights of Man and of the Citizen declared explicitly that “all sovereignty resides essentially in

<sup>51</sup> Dugard *International Law* 83

<sup>52</sup> A Heywood *Political Theory* 3 ed (2004) 92–94

<sup>53</sup> P Manent *An Intellectual History of Liberalism* (1995) 39–44, 54–55

<sup>54</sup> See for example the Danish Kongeloven (Lex Regia) from 1665

<sup>55</sup> E Morgan *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988) 22

the nation”.<sup>56</sup> Therefore, internal (national) sovereignty could be explained as the relationship between a sovereign power and its own subjects. A central concern was legitimacy; in other words, what gave the government the right to exercise authority. Claims of legitimacy might refer to the divine right of kings or to a social contract (ie popular sovereignty). In classical political theory, national sovereignty translates into a representative constitutional system, because a nation cannot be governed by direct democracy, given the impossibility of direct representation of its past and future citizens. The simple majority of the residents of the territory of a nation, or even of its citizens, is not necessarily considered identical to the will of the nation. However, a state that has national sovereignty is one with a government that has been elected by its people, that therefore enjoys popular legitimacy but only within the scope of the founding document that limits the powers of the state *vis-à-vis* its citizens and structures certain basic rights.

## 5 Reference to colonial legacy

From the discussion above it is quite clear that the South African government is venturing down a precarious road in trying to convince the public that it has an overarching right to super-impose its power over land based on the concept of national sovereignty. To legitimise its increased powers over land, as discussed above, it uses a continuum of phrases all referring back to South Africa’s troubled past. The relevant issues at hand are whether today’s agrarian reform is at all an anti-colonial struggle and if the oppressive colonial history of South Africa could really legitimise the disregard of the Constitution with regards to agrarian reform and nationalisation of land as the Green Paper seems to suggest. As indicated in the Green Paper, the strategy of the Department is “Agrarian Transformation” which is interpreted to mean “a rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community”.<sup>57</sup> The goal of this strategy is to attain “social cohesion and development”.<sup>58</sup> This strategy is framed by the Department as an “on-going anti-colonial struggle” which is at the core about “repossessing land lost through force and deceit and restoring the centrality of indigenous culture”,<sup>59</sup> as mentioned above.

The relevant questions are whether we can and should understand land reform as an on-going “colonial struggle” in present day South Africa and, if so, how do we frame this discussion within the objective, as put forward by the government, to “restore the centrality of indigenous culture”? Perhaps it would have been more helpful if the Green Paper would have re-phrased the “colonial struggle” to a struggle against the inequalities in land possession as created during colonialism and Apartheid. In the racially segregated and charged South Africa of today it is of great value to try to separate the systems created and converted from the people creating and engaging with

<sup>56</sup> The Declaration of the Rights of Man and of the Citizen (1789)

<sup>57</sup> Department of Rural Development and Land Reform *Green Paper on Land Reform* 1

<sup>58</sup> 1

<sup>59</sup> 1



them. It would furthermore have been useful if the Green Paper had related to the many current problems and general policy weaknesses that need to be combated to make any agrarian reform successful in South Africa. An attempt of this nature was made in a short presentation by the Department to the public on 25 of August 2011 where the following weaknesses and contributing factors to the failure of the current policy were pointed out: Land acquisition strategy/WBWS – a distorted land market; fragmented beneficiary support; beneficiary selection for land redistribution; land administration/governance – especially in communal areas; meeting the 30% redistribution target by 2014; declining agricultural contribution to the GDP; unrelenting increase in rural unemployment; and, a problematic restitution model and its support system (communal property institutions and management).

The same presentation also pointed out the three core principles/objectives with the new trajectory of agrarian reform as presented in the Green Paper as de-racialisation of the rural economy; democratic and equitable land allocation and use across gender, race and class; and strict production discipline for guaranteed national food security. If viewed from the perspective of the additional information, not part of the government's official policy, it becomes easier to reflect on the suggested remedies as spelled out in the Green Paper, namely the repossession of land and restoration of culture. From the problem statement above it is quite obvious that the repossession of land and restoration of indigenous culture is going to do very little *per se* in the struggle to tackle the problems highlighted above. It is furthermore evident that values and guiding principles are not forwarded by branding the new strategy for land reform an "anti-colonial struggle".

Of further interest is what culture is supposed to be restored in the ethnically diverse and fragmented South Africa of today? Section 30 of the Constitution indicates that everyone has the right to use the language and to participate in the cultural life of their choice, section 9 prescribes the right to equality of all based on language, culture, religion and ethnicity; and section 31 guarantees that everyone has the freedom to enjoy their culture in association with others and to express their culture within the realm of the Bill of Rights. The preamble to the Constitution frames these rights and freedoms by stating that all who live in South Africa are to be united in their diversity. The Minister has on several occasions indicated that the Green Paper is to be the point of departure for a *robust* discussion between the government and various stakeholders, as discussed above. But if the rhetoric used in the Green Paper does not reflect the values of diversity and unity as enshrined in the Constitution, it is not likely to be either a useful fundament for meaningful agrarian reform or a basis for a robust discussion of future reform.

If judged by the magnitude of the theoretical discussions in the Green Paper, a lot of effort has gone into reflecting over South Africa's past and little attention has been given to the idea of trying to move away from the colonial genesis. The Green Paper is in this spirit ended with a number of quotes from Dube, the founding president of the ANC. In his important critique of racially discriminatory laws presented in his testimony to the Natives' Economic



Commission in 1930, Dube expresses that the future for all South Africans lies within the land being:

“Purchased for them and handed over; all the African areas ought to be properly surveyed and divided into small building plots, grazing grounds and gardens.”<sup>60</sup>

As indicated in the Green Paper and elsewhere in the government’s development policy, small scale, subsistence farming is high on the agenda of the ANC government to alleviate poverty, especially in the rural areas. In the 2009 National Election Manifesto, the ANC identified land reform as being one of five priority areas for the coming five years.<sup>61</sup> In the manifesto the ANC took a great step away from the liberal market-led reform that was introduced in 1994 towards a land strategy based on the idea “[t]he land shall be shared amongst those who work it”!<sup>62</sup> Based on the latest ANC manifesto, which to a large extent have inspired the Green Paper, agrarian reform should be geared towards poverty alleviation and development of the rural areas mainly through the support of small scale farming as suggested already by Dube. In the 2009 National Election Manifesto it is further stated that “[t]he ANC is committed to a comprehensive rural development strategy linked to agrarian reform”.<sup>63</sup> The ANC is planning to achieve rural development through the expansion of access to food through production schemes in rural and peri-urban areas and teaching people how to grow their own food. The government (the ANC and government is used interchangeably in the manifesto) will further support existing community schemes which utilise land for food production in schools, health facilities, churches and urban and traditional authority areas. To make land available for this type of small scale and cooperative farming, the ANC aims at reviewing the appropriateness of the existing land redistribution programme and will introduce measures, such as the ones alluded to above, aimed at speeding up the pace of land reform, which will intensify the land reform programme, ensuring that more land ends up in the hands of the rural poor.

## 6 Conclusions

From the discussion above it can be concluded that internal and external sovereignty are two different concepts which apply in different contexts. External sovereignty affords the state full powers and a wide margin of appreciation within the international domain while most theories would regard internal sovereignty in a modern democracy as strictly limited by the founding agreement ie the Constitution in the South African case. Territory (externally) and land (internally) plays a vital role in relation to both concepts but while international law defines possession of territory as an exclusive base of power and then adds effective authority and so on, the concept of internal

<sup>60</sup> H Hughes *First President: A Life of John L Dube Founding President of the ANC* (2011) 244

<sup>61</sup> ANC “African National Congress Manifesto Policy Framework” (01-03-2009) *ANC 2* <[http://www.anc.org.za/docs/manifesto/2009/policy\\_frameworkz.pdf](http://www.anc.org.za/docs/manifesto/2009/policy_frameworkz.pdf)> (accessed 16-03-2012)

<sup>62</sup> South African Congress Alliance *The Freedom Charter* (1955)

<sup>63</sup> ANC “African National Congress Manifesto Policy Framework” *ANC 12*

sovereignty replaces actual possession with authority – authority which in a representative/popular democracy is limited by the founding agreement. The ideas on national sovereignty, as presented above can be used to deduct that national sovereignty is the authority of a state (popular sovereignty) to govern its population within the ambit given to it by the same. It is argued that national sovereignty is defined by the powers given by the people of a state to its government – in other words, the authority held by the government in trust of its people. This trust would give it the ability to assume jurisdiction and act on behalf of the people but in a constitutional democracy the government would never have the right to go beyond the Constitution without asking the people, in a representative constitutional system such as South Africa, the Parliament and the Council of Provinces, to first change the relevant parts of the Constitution.

To silence the voices warning the government that strategies that *arbitrarily* deprive individuals of their ownership could constitute a violation of the Constitution and as a move away from the nationalisation of land; the government in the Green Paper proposes that land should be regarded as a national asset because national sovereignty is defined in terms of land. This might be a true statement in terms of its external relationship with other states within the international community (as discussed above). It seems like the government, in this case, is leaning on international legal theory which indicates that equal sovereignty of states is closely related to the territory of the state and the state's authority over the territory. However, authority over territory should not be confused with the idea of monopolising land ownership for purposes of nationalisation. It is possible for a state to have authority over its territory without regarding land as a national asset, meaning that it belongs in appropriation terms to the state. It might even be advisable for the state to strengthen its authority to govern (more on this below) by allowing the most efficient individual, serving the purposes of the state of production and economic contribution, to own and occupy the land. Again it is important to understand the difference between internal and external sovereignty. Internal sovereignty and the authority of the government to govern its people and assets internally is closely related to the objectives of providing for the people and creating a stable environment for them to prosper within in accordance with the fundamental rights and freedoms as set out in the Constitution. Internal sovereignty is not about land as a national asset but about land management. It is quite clear that if we attempted to interpret the Constitution it would not define land as a national asset on the terms as proposed in the Green Paper; and therefore, as a consequence, the point of departure of the government in the Green Paper that agrarian change, land reform and rural development should depart from the qualification that all land in South Africa is by definition a state asset is therefore invalid. Furthermore, the statement of the government that “[n]ational sovereignty is defined in land” and that based on this “land is a national asset” would even go beyond the interpretation of the interim Constitution and later the final Constitution that Chaskalson, as discussed above, imagined. This does not mean that the government cannot and should

not honour the promise of re-distribution as spelled out in, for example, section 25(5) – it must. The problem, however, and this is a serious and complex issue, is that the founding agreement, the Constitution, should ultimately reflect the will of the majority of South African people and policy and legislation put in place should reflect this will. This is not true in terms of the first three sections of the property clause in the Constitution and with regard to the rigid protection of private property through policy such as the WBWS principle. It is difficult for the government to do what it has set out to do in the Freedom Charter within the scope of the current Constitution, but not impossible as further argued below.

The other side of the coin is, however, the fear that aggressive land reform built on a misconstrued idea of state sovereignty and the use of South Africa's colonial past and indigenous rights to justify this would destroy not only the fragile democracy of South Africa but would severely hamper the growth of South Africa and the ability of many poor South Africans to feed themselves to survive. If a government, with reference to national sovereignty, can claim control over all land without really considering the position of the founding agreement which, in the South African case, represents the shift from authoritarian to democratic rule, what would be the difference between the colonial state and the democratic state other than the possible motivations? Even if the motivations are noble and in line with nationally and internationally preferred values of democracy and basic human rights, should we go down this avenue considering its possible consequences? Agriculture, which is very labour-intensive in South Africa, has been pegged by many as a key sector to help create five million jobs by 2020 but uncertainty has already slowed investment and raised concerns about food security.<sup>64</sup> Although the government, by leaning on the argument that the colonisers destroyed the already existing, flourishing indigenous South African farming economy, want more black farmers to emerge, the Green Paper paints a bleak future for agriculture in South Africa as the policy does not make farming attractive as a career for any (white or black) prospective young farmer. Modern agriculture is a risky commercial business and most people in South Africa see farming as an industry that supplies food to the cities. It is clearly unrealistic to expect masses of people, as is expressed in the ANC Manifesto and Green Paper, to go back to farming as a way of life. However, if government policy supported agricultural ventures as a viable business alternative by refraining from threats of nationalisation characterised as part of an anti-colonial struggle, it might achieve the objective of maintaining (and even boosting) agricultural production and creating food security in South Africa and beyond.

<sup>64</sup> W Roelf "SA Struggles to Meet Land Reform Targets" (31-09-2011) *Mail & Guardian Online* <<http://mg.co.za/article/2011-08-31-sa-struggles-to-meet-land-reform-targets>> (accessed 16-03-2012)

Nationalisation of land or viewing the land as a national asset in terms of internal sovereignty without regard for the Constitution is not a constructive way forward. Social and economic progress or development does not *only* have to be hinged on equality of ownership. The key is to open up more space for constitutionally driven land reform *and* make those who own support those who do not, to make those who own generate work under agreeable conditions for those who need work, to make those who own generate income for the treasury to be re-allocated through working social welfare structures. The statement of the current challenges and weaknesses and the rationale for change in the presentation by the Department to the public on 25 August was right on target in indicating that the problems of the current policy lie within a system failure coupled with unrealistic targets. However, these problems are not solved by nationalisation or even a nationalisation debate which will only serve to weaken South Africa's position as a trade partner and home for investments but through a wider interpretation of section 25(1)-(3). However, if the government wants to move towards nationalising the bulk of farm land in South Africa, contrary to all the warnings that have been issued, it should do so openly and by suggesting a constitutional amendment in accordance with section 74 and open up the public room for discussions in this regard. But if we take some time to reconsider the thoughts brought forward by, among others, Chaskalson and Hall, as alluded to earlier in this article, there is scope for a discussion about *constitutional* land reform within the Constitution itself without resorting to the amendment of the Constitution or nationalisation as suggested in the Green Paper. The government has previously been very creative in its policy statements, coming up with, for example, the WBWS principle; and there is a great need for a new analysis of what can be done within the realm of the Constitution. The Constitution clearly gives more scope for the limitations of private ownership than the interim Constitution, considering the fact that section 28(1) spelling out the right for everyone to acquire and hold rights in property was not re-established in the Constitution.<sup>65</sup> The discussion going forward should centre on the possibility of expropriation not necessarily linked to market-related compensation (taking into consideration that market-related value is but one of the circumstances indicated in section 25(3)) and/or deprivation of property for re-distribution purposes building on the fact that the deprivation has to be brought forward in legislation and the non-arbitrariness has to be established. As held by O'Regan J in *Mkontwana v Nelson Mandela Metropolitan Municipality*<sup>66</sup> alluding to the decision in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services*; *First National Bank of SA Limited t/a Wesbank v Minister of Finance*,<sup>67</sup> a court must consider the extent of the deprivation and evaluate it in the light of the purpose of the legislation that occasions the

<sup>65</sup> This section could equally be used to argue a weakening of the socio-economic scope of the right for everyone to property but this is outside the scope of this article

<sup>66</sup> 2005 1 SA 530 (CC) para 90

<sup>67</sup> 2002 4 SA 768 (CC) para 100

deprivation, in order to determine whether there is “sufficient reason” for the deprivation.<sup>68</sup> O’Regan J goes on by concluding that:

“It should be emphasised, however, that there may be limitations on property rights which are either so trivial or are so widely accepted as appropriate in open and democratic societies as not to constitute ‘deprivations’ for the purposes of section 25(1). This is not a matter which I need to decide for the purposes of this case, and it may be left open for further consideration in future.”<sup>69</sup>

It is in this phrase, where O’Regan J points us in the direction of “wide acceptance” that a constructive discussion about land reform without constitutional amendment or nationalisation can take its point of departure. From this perspective there is a great need for new constructive policy and legislation that focuses on the re-distribution and the socio-economic values of property. It is submitted that under some circumstances<sup>70</sup> deprivation of property for purposes that would enhance the fundamental principles of equality, freedom and dignity as spelled out in section 39 of the Constitution as cornerstones of South Africa’s democracy could fit within the ambit of this “wide acceptance” and would not be regarded as arbitrary if spelled out in law of general application. This approach would aid the government in reaching its goal to re-distribute property on a larger scale, to enable citizens to gain access to land on an equitable basis as spelled out in section 25(5) of the Constitution.

Furthermore, public purpose or interest related to expropriation as spelled out as a necessity in section 25(2) includes the nation’s commitment to land reform as indicated in section 25(4). Public purpose and interest must invite us to draw equally from the concepts of equality, dignity and freedom as spelled out in section 39 of the Constitution, as discussed above. Hence, section 25(4)-(9) of the Constitution constitutionalises transformation of the property paradigm in South Africa and section 39 instructs any interpretation to promote equality, dignity and freedom. It is a powerful statement and it is in this interpretation of the expropriation clause together with the use of deprivation in some specific cases that the key to successful agrarian reform is found; not in a re-definition of national sovereignty or constitutional amendment.

<sup>68</sup> The meaning of arbitrary in s 25 of the Constitution was determined in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC). Ackermann J concluded that a deprivation of property is arbitrary within the meaning of s 25 of the Constitution if the law in issue either fails to provide “sufficient reason” for the deprivation or is procedurally unfair. To determine whether there is sufficient reason for a permitted deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law. A complexity of relationships must be considered in this assessment including that between the purpose of the provision on the one side, and the owner of the property as well as the property itself on the other. If the purpose of the law bears no relation to the property and its owner, the provision is arbitrary. The customs law in issue in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) fell into this category. It permitted total deprivation of property even when the customs debt bore no relationship either to the owner or to the property itself.

<sup>69</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 90.

<sup>70</sup> Taking into account, for example, the history and the acquisition of the property, the historical and current use of the property, the size of the property and the potential of the property to fulfill communal needs *vis-à-vis* individual needs.

Finally, with reference to the colonial struggle and the new cultural hegemony to be constructed, the root of the many problems facing agrarian land reform in South Africa and elsewhere should not be confused with the methods of tackling these challenges. It is possible to find many of the causes of the present day land crisis in the racist colonial and apartheid structures but the methods of solving these issues are not found in an anti-colonial struggle. The answer is instead found in the struggle for a comprehensive and nuanced re-analysis of the deprivation and expropriation clauses in section 25 of the Constitution to suit the purposes of re-distribution; as well as focusing on combatting corruption and mismanagement of current re-distribution schemes and to remedy the apparent lack of funding to monitor a just and equitable implementation of the right of all citizens to gain access to land on an equitable basis.

### SUMMARY

The results of post-apartheid land reform in South Africa have for a substantial period of time prompted scholars to ask key questions about the ability of law to achieve social change. Change in this case translating into an equal (based on race) distribution of agricultural land and in turn the role of the distribution of such land in combating poverty. With the imminence of the centenary of the notorious Native Land Act 27 of 1913, which dispossessed millions of black South Africans, issues of land reform are contentious and high on the agendas of both the government and civil society. Currently most of the deadlock in implementing and rejuvenating the existing reforms is linked to the perceived limitations within the Constitution of the Republic of South Africa, 1996 itself and the apparent difficulties in amending it. Therefore, one possible alternative way of rectifying the massive inequalities in the distribution of agricultural land is to try to fashion new discourses, which could expand the state's ability to undertake the necessary reforms. This article sets out to explore what appears to be one such (new) discourse, as introduced in the Green Paper on Land Reform of 2011, focusing on how the concept of state sovereignty can be used or misused, defined or re-defined to suit the determinations of a state, such as South Africa, in agrarian reform. This article emphasises the possible links between different theories on state sovereignty (internal and external) and agrarian reform for agricultural purposes; and the way in which the idea of state sovereignty can act as a vehicle for hard-line agrarian reform when all else appears to have failed. This article furthermore attempts to highlight some alternative avenues in constitutional interpretation to furnish new routes out of the current stalemate; focusing on remedies which currently are under explored and deserve more scholarly attention.